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Real Party in Interest

FILED
San Francisco County Superior Court

JUN 12 2019

CLERK OF THE COURT

BY:  Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

11 **DEAN R. GRAFILO, DIRECTOR OF THE**
12 **DEPARTMENT OF CONSUMER**
13 **AFFAIRS, STATE OF CALIFORNIA,**

Plaintiff,

v.

15 **KAISER FOUNDATION**
16 **HOSPITALS/THE PERMANENTE**
17 **MEDICAL GROUP,**

Respondent,

20 **KIMBERLY KIRCHMEYER,**
21 **EXECUTIVE DIRECTOR, MEDICAL**
22 **BOARD OF CALIFORNIA,**

Real Party in Interest.

Case No. **CPF-19-516699**

**PETITION FOR ORDER TO SHOW
CAUSE AND ORDER COMPELLING
COMPLIANCE WITH
INVESTIGATIONAL SUBPOENA**

Date:

Time:

Dept: 302

Judge: Hon. Ethan P. Schulman

Trial Date:

Action Filed: June 12, 2019

24 Petitioner Dean R. Grafilo, Director of the Department of Consumer Affairs, State of
25 California (DCA), by his attorneys Xavier Becerra, Attorney General of the State of California,
26 and Lawrence Mercer, Deputy Attorney General, alleges as follows:
27
28

1 1. Petitioner Dean R. Grafilo (Petitioner) is the duly appointed Director of the
2 Department of Consumer Affairs. He brings this action solely in his official capacity as Director.

3 2. The Department of Consumer Affairs of the State of California is a department within
4 the meaning of Government Code §§ 11180 *et seq.* Under Government Code §§ 11181 and
5 11182, the Director of the DCA is the head of the Department and has the authority to conduct
6 investigations, issue subpoenas, and take testimony in connection with matters within the
7 jurisdiction of the Department. The Director also has the power to delegate such authority.

8 3. Real Party in Interest Kimberly Kirchmeyer is the Executive Director of the Medical
9 Board of California (Medical Board or Board) which is a duly constituted government agency
10 within the DCA. The Medical Board is charged with the enforcement of the Medical Practice Act
11 (Business and Professions Code §§ 2000 *et seq.*) and with investigating complaints from
12 consumers, from other licensees, from healthcare facilities, or from the Board itself, that a
13 physician may be guilty of unprofessional conduct. (Business and Professions Code § 2220(a).)
14 This proceeding directly affects the interests of the Medical Board because the petition seeks to
15 enforce compliance with an investigational subpoena issued during an ongoing Medical Board
16 investigation of possible violations of the Medical Practice Act by its licensee Michael Fielding
17 Allen, M.D. (Respondent)

18 4. The Director of the DCA has delegated to officers of the Medical Board, which is an
19 agency within the DCA, the authority to issue subpoenas under Government Code § 11182.

20 5. Michael Fielding Allen, M.D. holds a Physician's and Surgeon's Certificate issued by
21 the Medical Board, which permits him to engage in the practice of medicine and to issue
22 exemptions from mandatory vaccinations to qualifying patients.

23 6. By way of this petition, the Medical Board requests an order compelling Kaiser
24 Foundation Hospitals (KFH) to comply with an investigational subpoena for unredacted
25 vaccination exemptions and related information in their possession. As set forth in the
26 Declaration of Supervising Special Investigator Rashya Henderson, filed herewith, KHF was
27 duly served with the investigational subpoena, but has advised that it will only comply with the
28 subpoena pursuant to a court order. As set forth in Ms. Henderson's declaration and the

1 Declaration of James Nuovo, M.D., the records sought are relevant and necessary to the
2 investigation of vaccination exemptions issued by Michael Fielding Allen, M.D.

3 7. On May 17, 2018, the Board received a complaint from the Assistant Chief of
4 Pediatrics at Kaiser, Roseville, stating that a Kaiser patient had been given an inappropriate
5 vaccine exemption letter by Dr. Allen. On May 21, 2018, the complainant sent a copy of a
6 redacted exemption letter issued by Dr. Allen. The exemption stated that the (name redacted)
7 child was a patient under his care and that the child's physical condition and medical
8 circumstances were such that the child was permanently exempted from any vaccination deemed
9 necessary "now and/or in the future."

10 8. On March 13, 2019, an investigator for the Medical Board served a subpoena for
11 unredacted vaccination exemptions and related information in the possession Kaiser Foundation
12 Hospitals.

13 9. On March 28, 2019, counsel for The Permanente Medical Group (TPMG) responded
14 that the requested documents and information would be provided if ordered to do so by a court
15 "and our client is willing to stipulate to the issuance of such an order." On May 16, 2019, counsel
16 advised that the exemptions are in the possession of TPMG and any order for production should
17 be directed to TPMG.

18 10. In support of this Petition for Order to Show Cause and Order Compelling
19 Compliance with Investigational Subpoena, Petitioner offers the Declaration of James Nuovo,
20 M.D. He is a board-certified physician in the field of Family Medicine. Dr. Nuovo has reviewed
21 the information obtained by the Board's investigation and has opined that the exemptions appear
22 to have been issued without a history and evaluation and that the exemptions do not demonstrate
23 a valid medical indication.

24 11. Pursuant to Government Code § 11186, venue lies in the County of San Francisco,
25 where the investigation was directed by the Office of the Attorney General, and pursuant to
26 §11188 this Court has the authority to issue an Order to Show Cause why TPMG should not be
27 ordered to comply with the investigational subpoenas served upon them.
28

12. On June ____, 2019, at ____, counsel for TPMG was given notice of the ex parte application for an Order to Show Cause.

WHEREFORE, pursuant to Government Code §§ 11186-88, Petitioner respectfully requests that this Court issue an order requiring TPMG to appear before this Court and to show cause why it has failed to comply with the investigational subpoena served on it and, upon failure to show cause, to enter an order:

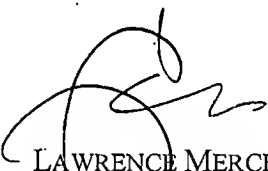
1. Requiring TPMG to produce the records sought by the investigational subpoena to Supervising Special Investigator Rashya Henderson within 15 days of the hearing on this petition; and,

2. Taking such further action as the Court deems appropriate in the interests of justice.

Dated: June 11, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
JANE ZACK SIMON
Supervising Deputy Attorney General



LAWRENCE MERCER
Deputy Attorney General
*Attorneys for Petitioner and
Real Party in Interest*

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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State, Number, and address): Xavier Becerra, Attorney General Lawrence Mercer, Deputy Attorney General (SBN 111898) Office of the Attorney General 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102 TELEPHONE NO.: (415) 510-3488 FAX NO.: (415) 703-5480 ATTORNEY FOR (Name): Petitioner and Real Party in Interest		FOR COURT USE ONLY <h1 style="margin: 0;">FILED</h1> <p>San Francisco County Superior Court</p> <p style="font-size: 1.2em;">JUN 12 2019</p> <p>CLERK OF THE COURT</p> <p>BY: Deputy Clerk</p>	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, California 94102 BRANCH NAME:		CASE NUMBER: <h2 style="margin: 0;">CPF-19-516699</h2> <p>JUDGE: Schulman DEPT: 302</p>	
CASE NAME: Dean Grafilo v. Kaiser Foundation Hospitals/The Permanente Med. Group			
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)		Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:		
Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input checked="" type="checkbox"/> Other petition (not specified above) (43)

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties | d. <input type="checkbox"/> Large number of witnesses |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input type="checkbox"/> Substantial amount of documentary evidence | f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
3. Remedies sought (check all that apply): a. ☐ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): One
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 6/11/2019

Lawrence Mercer, Deputy Attorney General

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2